(27,775)

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1920.**

## No. 418.

THE G. S. WILLARD COMPANY, HENRY S. NARTEN, PERRY F. NARTEN, AND W. A. DUFF, APPELLANTS,

*vs.*

A. MITCHELL PALMER, AS ATTORNEY GENERAL OF THE UNITED STATES, AND EDWIN S. WERTZ, AS UNITED STATES DISTRICT ATTORNEY FOR THE NORTHERN DISTRICT OF OHIO.

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.**

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 13, 1920.

1 UNITED STATES OF AMERICA,
*Northern District of Ohio, Eastern Division, ss:*

Record of the Proceedings of the District Court of the United States within and for the Eastern Division of the Northern District of Ohio, in the Cause and Matter Hereinafter Stated, the same being finally disposed of at a regular term of said court begun and held at the City of Cleveland, in said District, on the first Tuesday in April, being the 6th day of said month, in the year of our Lord One Thousand Nine Hundred and Twenty, and of the Independence of the United States of America the one Hundred and forty-fourth, to-wit, on Monday, the 21st day of June, A. D. 1920.

Present: Honorable D. C. Westenhaver, United States District Judge.

No. 553. In Equity.

THE G. S. WILLARD COMPANY et al.
vs.
A. MITCHELL PALMER et al.

Said action was commenced on the 4th day of June, A. D., 1920, and proceeded to final disposition at the term and day above written, and during the progress thereof, pleadings and papers were filed, process was issued and returned and orders of the Court were made and entered in the order and on the dates hereinafter stated, to-wit:

2 *Bill of Complaint.*

Filed June 4, 1920.

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

In Equity. No. 553.

THE G. S. WILLARD COMPANY, a Corporation, HENRY S. NARTEN, PERRY F. NARTEN, W. A. DUFF, Plaintiffs,
vs.
A. MITCHELL PALMER, as Attorney General of the United States; Edwin S. Wertz, as United States District Attorney for the Northern District of Ohio, Defendants.

*Bill of Complaint.*

Now come the plaintiffs above named, by their solicitors, and for their cause of action against the defendants say:

## I.

The plaintiff, The G. S. Willard Company, is a corporation duly incorporated and organized under the laws of the State of Ohio, having its principal place of business at the City of Cleveland in the Eastern Division of the Northern District of Ohio and is a citizen and resident thereof. The plaintiffs, Henry S. Narten, Perry F. Narten and W. A. Duff, are all citizens and residents of the Eastern Division of the Northern District of Ohio.

## II.

The defendant, A. Mitchell Palmer, is the duly appointed and acting attorney general of the United States and is a citizen and resident of the State of Pennsylvania. The defendant, Edwin S. Wertz, is a citizen and resident of the Eastern Division of the Northern District of Ohio and is United States District Attorney for the Northern District of Ohio.

## III.

3 This is a suit of a civil nature in equity and arises under the Constitution of the United States, in this, to-wit: This suit necessarily involves and presents for determination the question of the validity under the Constitution of the United States of an Act of Congress, approved August 10, 1917, entitled, "An Act to Provide Further for the National Security and Defense by Encouraging the Production and Conserving the Supply and Control and Distribution of Food Products and Fuel," and the Act of Congress, approved October 22, 1919, amending said last mentioned Act and therein designated as the "Food Control and the District of Columbia Rents Act," said Act of August 10, 1917, and the amendment thereof of October 22, 1919, being known and hereinafter referred to as the "Lever" Act. If said Act be enforced against these plaintiffs by defendants, as threatened to be enforced by them, as hereinafter set forth, and as it will be enforced if enforcement thereof is not enjoined as herein prayed, such enforcement will, by reason of the facts hereinafter stated, necessarily and certainly entail upon plaintiffs and upon each of them a loss and damage greatly in excess of the sum of Five Thousand Dollars ($5,000.00) exclusive of interest and costs, all as hereinafter shown, and by reason thereof the amount in controversy in this suit exceeds as to each plaintiff the sum of Five Thousand Dollars ($5,000.00) exclusive of interest and costs.

## IV.

The plaintiff, The G. S. Willard Company, was incorporated under the laws of the State of Ohio in the year 1915, and continuously since that date has been engaged in business with its headquarters at Cleveland, Ohio, and has continuously bought, sold and

distributed sugar to the Northern Ohio trade. Its principal customers are bakers, retail grocers and retail dealers in ice cream and similar products. During the year 1917 this company made gross sales of sugar approximately to the extent of $1,500,000.00; in 1918, approximately to the extent of $2,000,000.00; in the year 1919, approximately to the extent of $2,250,000.00. The
4 plaintiffs have a large sum of money invested in said business and in the course of its operation have acquired a reputation among the trade for fair dealing and a good will which is of great value. The plaintiffs have complied with all of the laws of the United States and have always done all things required of them by the laws of the United States.

V.

The plaintiff, Henry S. Narten, is President; the plaintiff, Perry F. Narten, is Vice-president; the plaintiff, W. A. Duff, is Treasurer, of the corporation plaintiff, The G. S. Willard Company. All of these individual plaintiffs at the present time are and for many years last past have been large stockholders in The G. S. Willard Company. By reason of the foregoing facts the property interest and business of the plaintiffs are so mingled and inter-related that an injury to the business of one of the plaintiffs would injuriously affect the business of each of the other plaintiffs. The business of the corporation plaintiff is largely outlined, managed and carried on by the individual plaintiffs. If the defendants carry out and do as to the said individual plaintiffs, or any of them, the things by them threatened that they will do as in this bill stated, the property and business of each and all of the plaintiffs will be seriously injured and said plaintiffs and each of them will suffer great and irreparable loss and damage for which plaintiffs and each of them have no adequate remedy at law.

VI.

That the business carried on by the plaintiff corporation and the individual plaintiffs consists of the buying of sugar and the selling of the sugar so bought as hereinbefore stated to the various bakers, retail grocers, dealers in ice cream and similar products; that at the present time practically the entire supply of sugar which these plaintiffs are able to obtain for the purpose of carrying on the busi-
5 ness as aforesaid, is bought from The American Sugar Refining Company and The Franklin Sugar Refining Company; that owing to the great scarcity of sugar at the present time, these plaintiffs can obtain sugar from no other source sufficient in quantity to enable them to carry on their business as aforesaid.

VII.

Under date of May 7, 1920, these plaintiffs received the following communication:

"New York, May 7, 1920.

To the Trade:

All contracts are subject to the rules and regulations of the United States Government in effect at the time of shipment and delivery.

Every contract must bear the customer's United States Food Administration license number, except in cases of customers who are not required to have a license by reason of doing a business of less than $100,000 per annum. In such cases the notation 'No Food Administration license required' must appear on the contract.

Sales will not be made to persons or firms whose licenses are revoked or who are under indictment by the United States Government.

THE AMERICAN SUGAR REFINING COMPANY.
THE FRANKLIN SUGAR REFINING COMPANY."

If an indictment is returned by the United States Government against these plaintiffs, these plaintiffs, or any of them, would be prevented from carrying on their lawful business; the business organization of the corporate plaintiff would be disrupted, and the individual plaintiffs would suffer great financial loss for the reason that they would not be able to obtain a sufficient supply of sugar to continue their legitimate business. Many bakers, grocers and dealers in ice cream and similar products rely on their supply of sugar from the plaintiffs herein. If the supply of sugar of the plaintiffs is cut off or if their business is disrupted, not only will the customers of the plaintiffs suffer great loss and damage but the public generally will suffer great damage and hardship as a result of their inability to obtain their supply of sugar from those who deal with the aforesaid plaintiffs.

6

VIII.

Plaintiffs are advised and therefore allege the fact to be that Section 4 of the Act of Congress, commonly known as the Lever Law, and Section 2 of the amendatory Act of 1919, said provisions being the only ones of such Act or of the amendment thereto having to do with the sale of sugar and upon which any indictment returned against these plaintiffs would necessarily have to be predicated, are unconstitutional and void because of the following and other reasons:

(a) The said Lever Law and said amendatory Act of 1919 were enacted by Congress in the attempted exercise of the so-called war powers conferred and delegated to Congress by the Constitution of the United States and the enactment of the aforesaid provisions and each of them was at the time of the enactment thereof beyond the power of Congress. Said provisions of said Lever Law and of said amendatory Act of 1919 must be construed as being limited in their application to acts which would affect and interfere with the successful prosecution of the war or the preparation of the national defense or must be held to be beyond the war power of Congress, and said provisions and each of them, if tested and construed solely ac-

cording to the language therein found, in no way relate to the exercise of any of the war powers and are in violation of the Tenth Amendment of the Constitution.

On October 22, 1919, the date when the amendatory Act of 1919 was passed and approved, there existed no situation calling into play war powers of Congress and particularly none authorizing or permitting the exercise of such powers in respect to the particular matters which were the subject of said legislation. As a consequence, said amendatory act was and is wholly beyond the power of Congress and is in conflict with the Tenth Amendment of the Constitution of the United States.

7 Both said Lever Law and said amendatory Act of 1919 expressly asserted as the reason of and ground for their enactment that it was "essential to the national security and defense, for the successful prosecution of the war and for the support and maintenance of the Army and Navy" and by Section 24 of said Lever Law, it was expressly provided that "the provisions of this Act shall cease to be in effect when the existing state of war between the United States and Germany shall have terminated." On October 22, 1919, when said amendatory Act of 1919 was passed and approved, and prior thereto, the state of war between the United States and Germany had actually terminated, the Army and Navy had been demobilized and reduced to a peace basis and there existed no situation calling into play the war powers of Congress to enact, as it thereby attempted to do, that an act declared unlawful in Section 4 of said Lever Act, as originally passed, and which was not therein declared to be a crime or punishable as such, was, if committed thereafter, to constitute a crime and be punishable by fine or imprisonment.

(*b*) Said provisions and portions of said Lever Law herein referred to and of said amendatory Act of 1919 are, and each of them is so vague, indefinite and uncertain that they cannot have the force and effect of law within the meaning of the Constitution of the United States and particularly of the Fifth Amendment thereof, or be enforced by the Courts.

(*c*) The aforesaid sections of said Lever Law and of said amendatory Act of 1919 are unconstitutional and void because the exaction of a fine or penalty under the provisions thereof would constitute the taking of property or the deprivation of liberty without due process of law, in violation of the Fifth Amendment of the Constitution of the United States.

(*d*) The prosecution and punishment of a person under the aforesaid provisions of said Lever Law and of said amendatory
8 Act of 1919 would be in violation of the Sixth Amendment of the Constitution of the United States, which requires that in all criminal prosecutions the accused shall be informed of the nature and cause of the accusation against him.

(*e*) Said provisions of said Lever Law and of said amendatory Act of 1919 do not furnish any standard or rule or guide or basis for

determining what are necessaries or what are excessive prices or what is the meaning of the phrase, "to engage in any discriminatory and unfair or any deceptive or wasteful practice or device," or what is meant by the phrase, "to restrict the supply of any necessaries" or the phrase, "to restrict the distribution," or for determining what are "unjust" or "unreasonable" "rate" or "charge," all as used in said Act, and said words and phrases so used have no definite and established meaning.

(*f*) The aforesaid provisions of said Lever Law and of said amendatory Act of 1919, in so far as they attempt to make it a crime "to make any unjust or unreasonable rate or charge in handling or dealing in or with necessaries" or in so far as they attempt to make it a crime to conspire to charge "excessive prices," are unconstitutional and void for the reason that it is an unconstitutional delegation of legislative power to vest the function of fixing prices in a court or jury.

(*g*) The aforesaid sections of said Lever Law and of said amendatory Act of 1919 do not define the offenses thereby denounced as crimes and for which severe punishment and penalties are thereby provided, but leave the definition thereof to the varying opinions of judges and juries in trials after the fact, making said provisions necessarily ex post facto laws, in conflict with Article I, Section 9, Subdivision 3, of the Constitution of the United States.

(*h*) The classification made in Section 4 of said Lever Law, as amended by Section 2 of said amendatory Act of 1919,
9 whereby those engaged in certain occupations, pursuits and businesses are wholly exempt from the operation thereof, is unjust, unreasonable and arbitrary and render said section unconstitutional and void, in that penalties inflicted under said section would deprive any person convicted thereunder of their property and rights without due process of law.

## IX.

Plaintiffs show that in spite of the fact that the aforesaid provisions of said Lever Law and of said amendatory Act of 1919 are unconstitutional and void, said defendants, Palmer and Wertz, and their assistants, have threatened to return an indictment or indictments under the provisions of the Lever Act and the amendatory Act of 1919 against these plaintiffs and have threatened to cause warrants to be issued for their arrests, said indictments and warrants being wholly based upon said void and unconstitutional provisions of the Lever Act aforesaid and being but one of a series of steps proposed and threatened by the defendants for the enforcement of said unconstitutional law. Plaintiffs say that the return of indictments against them or any of them for alleged violation of said Lever Act or the amendatory Act of 1919 or the prosecution by the defendants of these plaintiffs for alleged violation of said Acts, will result in said plaintiffs being totally unable to purchase the sugar that is

necessary to be purchased by them in order that they may carry on their said business and supply their customers as aforesaid, and that thereby their business will be destroyed and they will suffer great and irreparable injury; and that the return of indictments against them or the commencement of prosecutions against them, as aforesaid, will impose upon and cause the plaintiffs herein great and irreparable injury, in that said plaintiffs will be subjected to continuous and repeated harrassment and that said plaintiffs will,
10 by reason of said indictment and prosecution, be subjected to great humuliation and unfavored publicity and will as a result thereof, lose many of their customers and much of their business and will be deprived of the good will which they have built up and now own in said business.

X.

The plaintiffs show that each and every sale of sugar made by plaintiffs or any one of them might be held by a court or jury in a prosecution under the aforesaid provisions of said Lever Law or said amendatory Act of 1919, to be a violation thereof and to constitute a separate offense for which the plaintiff, making said sale, might be subjected to the heavy fines and penalties provided for in said Acts respectively; that the plaintiffs are constantly engaged in selling sugar in open competition and at ruling prices; that the cost to them of obtaining sugar varies at different times and the sale price in open competition varies from time to time; that it is absolutely impossible for the plaintiffs or any of them or any of their officers or agents to determine or ascertain from the provisions of the Acts of Congress above mentioned, what is an unjust or unreasonable or excessive price for sugar, and the said individual plaintiffs above named, the officers and representatives of the corporation plaintiff are in peril of criminal prosecution based upon the said Acts of Congress hereinbefore referred to. Said plaintiffs aver that they have at no time made excessive or unreasonable profits; that during the year 1918, the profits derived from the business amounted to $7,000.00 upon sales of sugar of $1,750,000.00, and in 1919, on sales of sugar of $2,000,000.00, the profits amounted to $11,000.00; that these plaintiffs do not know what prices are in violation of the aforesaid provisions of said Acts of Congress, or whether or not the prices at which they are daily selling sugar may be held to violate said provisions, the result of which is that it is impossible for the plaintiffs to carry on their business without having their agents and officers and
11 themselves daily and hourly take the risk and peril of criminal prosecution and the normal and orderly and proper conduct of the business of the plaintiffs is interrupted and interfered with, to the great and irreparable loss and damage of said plaintiffs and each of them.

All of the foregoing shows that the plaintiffs herein and each of them will be subjected to great and irreparable injury by the prosecution of the individual plaintiffs named herein or the return of an indictment against any of the plaintiffs named herein or any such other proceedings as are threatened to be instituted by the defend-

ants as aforesaid, unless said defendants are restrained and enjoined as herein prayed.

Wherefore, plaintiffs pray that upon the filing of this bill the court issue a restraining order for a period not to exceed ten days, restraining the defendants and each of them from signing any indictment or from filing any indictment with the Clerk or other official of this court, based upon the provisions of Section 4 of the Lever Act or the amendatory Act of October 22, 1919; that the defendants and each of them, their assistants, agents and representatives, be restrained from arresting or causing to be arrested any of the individual plaintiffs hereto, or in any way arresting or threatening to arrest any of the plaintiffs or any of their officers or employees by means of said Lever Act or their enforcement thereof by criminal or civil proceedings; that the motion of the plaintiffs for a temporary injunction herein be set down for hearing at an early date; that upon the hearing of said motion a temporary injunction be granted, restraining said defendants, their assistants, agents and representatives, as hereinbefore prayed, until final hearing of this suit, and that upon final hearing, said temporary injunction be made permanent.

Plaintiffs further pray that the aforesaid provision of said
12 Act of Congress, passed and enforced August 10, 1917, commonly known as the Lever Law, and the amendatory Act passed and enforced October 22, 1919, be declared null and void as being in violation of the Constitution of the United States, and particularly the Fifth, Sixth, and Tenth Amendments thereof.

That defendants and each of them may be required to answer this bill of complaint but not under oath, answer under oath being hereby expressly waived.

And plaintiffs further pray that they may have such other and further relief as the court may determine just and proper.

CALFEE, FOGG & WHITE,
DAY, DAY & WILKIN,
*Solicitors for Plaintiffs.*

WILLIAM L. DAY,
J. G. FOGG,
*Of Counsel.*

STATE OF OHIO,
*Cuyahoga County, ss:*

Perry F. Narten, being duly sworn, on his oath deposes and says that he is one of the plaintiffs named in the foregoing bill of complaint; that he is Vice-president of the plaintiff, The G. S. Willard Company; that he is duly authorized by said corporation to make this oath; that he has read the foregoing bill of complaint; that the statements therein contained are true except as to allegations therein made on information and belief and as to such allegations, he believes them to be true.

PERRY F. NARTEN.

Sworn to before me and subscribed in my presence this 26th day of May, A. D. 1920.

JAMES J. LAUGHLIN,
*Notary Public.*

13 *Subpœna.*

THE UNITED STATES OF AMERICA,
*Northern District of Ohio, ss:*

The President of the United States of America to the Marshal of the Northern District of Ohio, Greeting:

You are hereby commanded to summon A. Mitchell Palmer, as Attorney General of the United States, citizen of and resident of the State of Pennsylvania, and Edwin S. Wertz, as United States District Attorney for the Northern District of Ohio, citizen of and resident of the State of Ohio, if they be found in your district, to be and appear in the District Court of the United States for the Northern District of Ohio, aforesaid, at Cleveland, on or before the twentieth day after service, excluding the day thereof, to answer a certain Bill in Equity, filed and exhibited in said Court, against them by The G. S. Willard Company, Henry S. Narten, Perry F. Narten, W. A. Duff, citizens of and resident in the State of Ohio.

Hereof they are not to fail under the penalty of the law thence ensuing. And have you then and there this writ.

Witness the Honorable John M. Killits and the Honorable D. C. Westenhaver, District Judges of the United States, this 4th day of June, A. D. 1920, and in the 144 year of the Independence of the United States of America.

[SEAL.]

B. C. MILLER,
*Clerk,*
By ANNA H. ELLIOTT,
*Deputy Clerk.*

*Memorandum.*

The said defendants required to file their answer or other defense in the Clerk's Office on or before the twentieth day after service, excluding the day thereof, otherwise the bill may be taken pro confesso.

B. C. MILLER,
*Clerk.*

14 Endorsement, when issued: No. 553. U. S. Marshal's No. 9286. United States District Court, Northern District of Ohio, The G. S. Willard Company et al. vs. A. Mitchell Palmer, etc., Edwin S. Wertz, etc. Subpœna in Equity. Return Day June 24, 1920. $25.00 deposited by plaintiff for costs. Day, Day & Wilkin, Complainant's Attorney. Filed June 9th, 1920. B. C. Miller, Clerk U. S. District Court N. D. O.

Endorsement when returned: U. S. Marshal's Office, Washington, D. C., June 8th, 1920. Served copy of the within Subpœna together with a copy of Bill of Complaint in said case on A. Mitchell Palmer, Attorney General of the United States, personally, June 7, 1920. Maurice Splain, U. S. Marshal, District of Columbia. R.

15 *Subpœna.*

THE UNITED STATES OF AMERICA,
*Northern District of Ohio, ss:*

The President of the United States of America to the Marshal of the Northern District of Ohio, Greeting:

You are hereby commanded to summon A. Mitchell Palmer, as Attorney General of the United States, citizen of and resident of the State of Pennsylvania, and Edwin S. Wertz, as United States District Attorney for the Northern District of Ohio, citizens of and resident in the States of Ohio, if they be found in your district, to be and appear in the District Court of the United States for the Northern District of Ohio, aforesaid, at Cleveland, on or before the twentieth day after service, excluding the day thereof, to answer a certain Bill in Equity, filed and exhibited in said Court, against them by The G. S. Willard Company, Henry S. Narten, Perry F. Narten, W. A. Duff, citizens of and resident in the State of Ohio.

Hereof they are not to fail under the penalty of the law thence ensuing. And have you then and there this writ.

Witness the Honorable John M. Killits and the Honorable D. C. Westenhaver, District Judges of the United States, this 4th day of June, A. D. 1920, and in the 144 year of the Independence of the United States of America.

[SEAL.]

B. C. MILLER,
*Clerk,*
By ANNA H. ELLIOTT,
*Deputy Clerk.*

*Memorandum.*

The said defendants required to file their answer or other defense in the Clerk's Office on or before the twentieth day after service, excluding the day thereof, otherwise the bill may be taken pro confesso.

B. C. MILLER, *Clerk.*

16 Endorsement: No. 553. U. S. Marshal's No. 9286. United States District Court Northern District of Ohio. The G. S. Willard Co. et al. vs. A. Mitchell Palmer, Edwin S. Wertz. Subpœna in Equity. Return Day June 24, 1920. $25.00 deposited by plaintiff for costs. Day, Day & Wilkin, Complainant's Attorney-. Filed June 10, 1920. B. C. Miller, Clerk U. S. District Court, N. D. O.

Endorsement when returned:

*U. S. Marshal's Return.*

THE UNITED STATES OF AMERICA,
*Northern District of Ohio, ss:*

Received this writ at Cleveland, Ohio, June 4th, 1920, and on the 8th day of June, 1920, at the same place I served it on the within named Edwin S. Wertz, by delivering to him personally a true and certified copy with all endorsements thereon. The within named A. Mitchell Palmer could not be found in my district.

CHAS. W. LAPP,
*U. S. Marshal.*
LOUIS WILCOX,
*Deputy.*

Marshal's Fees:

| | |
|---|---|
| Travel ..... | .06 |
| Service ..... | 2.00 |
| | 2.06 |

17 (Heard on application for temporary restraining order and submitted — entered June 5th, 1920, by Judge Westenhaver.)

No. 553. Equity.

WILLARD COMPANY

vs.

A. MITCHELL PALMER, etc., et al.

This day this cause came on to be heard on the application of temporary restraining order and was argued by counsel, submitted to the Court and taken under advisement by the Court.

18 *Motion to Dismiss Bill of Complaint.*

Filed June 15, 1920.

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

THE G. S. WILLARD COMPANY, a Corporation; HENRY S. NARTEN, PERRY F. NARTEN, W. A. DUFF, Plaintiffs,

vs.

A. MITCHELL PALMER, as Attorney General of the United States; Edwin S. Wertz, as United States District Attorney for The Northern District of Ohio, Defendants.

*Motion to Dismiss Bill of Complaint.*

The defendant herein, Edwin S. Wertz, United States Attorney, for the Northern District of Ohio, appearing in this action in response to service issued by the Court, and reserving the right to make further answer to the Bill of Complaint herein now respectfully moves this Honorable Court that the Bill of Complaint of the Plaintiffs filed herein be dismissed by order of this Court, for the following reasons, and each of them, severally and separately, to-wit:

1. This action is a civil suit in Equity wherein Plaintiffs, seek to enjoin defendant, as an officer of the United States, sworn and charged, from further performing his several duties in the prosecution of crimes and offenses committed against the United States in the Northern District of Ohio, particularly violations of the Act of Congress approved August 10, 1917, as amended by the Act of Congress approved October 22, 1919, and this Court is without jurisdiction as a Court of Equity to entertain, hear or determine any of the matters and things set forth in said Bill of Complaint.

19 2. This action is a civil suit in Equity wherein plaintiffs seek to enjoin the defendant, an officer of the United States, sworn and charged from further performing his several duties in the prosecution of crimes and offenses committed against the United States in the Northern District of Ohio, particularly violations of the Act of Congress approved August 10, 1917, as amended by the Act of Congress approved October 22, 1919, and this Court, sitting as a Court of Equity, is without equitable power to grant the relief prayed for in said Bill of Complaint.

3. This action is one merely to enjoin the return of an indictment by a Federal Grand Jury and the contemplated prosecution of a criminal offense committed against the United States, no indictment against the plaintiffs being pending in this Court, and no property rights of either or all of the plaintiffs herein are shown to be involved in said prosecution, other than except the possible infliction

of a fine, in the event of the return and filing of an indictment by a Federal Grand Jury against the plaintiffs, and in the event of the conviction of the plaintiffs upon such an indictment, in the event an indictment is returned and filed against the plaintiffs named herein, and that, therefore, this Court, sitting as a Court of Equity, has no jurisdiction to entertain, hear or determine the matters and things set forth in the Bill of Complaint herein and is without power to grant the relief prayed for in said Bill of Complaint.

4. The pleas contained in the Bill of Complaint filed herein do not entitle plaintiffs, or either of them separately or severally, to equitable relief and should be dismissed for want of equity.

5. This action is against officers of the United States of America, as representing the action, the liability and responsibility of the United States of America, to stop and prevent the United States of America from proceeding to prosecute by indictment the
20 individual plaintiffs for a violation of Federal Statutes and the action is against the United States of America, although the United States of America is not a party to the record, but is the real party in interest, and the only real party against which alone, in fact, the relief prayed for in this Bill of Complaint, is asked against which the judgment or decree prayed for in said Bill of Complaint would operate, and plaintiffs have not, by plea or otherwise, shown that the United States of America has directly or indirectly consented to the prosecution of this action nor has the United States of America consented to the prosecution of this action, or to be sued by either of the plaintiffs herein.

Wherefore, defendants pray for an order of Court herein dismissing plaintiffs' Bill of Complaint.

Respectfully submitted,

E. S. WERTZ,
*United States Attorney, Northern District of Ohio.*

21 *Memorandum Opinion.*

Filed June 18, 1920.

In the District Court of the United States for the Northern Division of Ohio, Eastern Division.

In Equity. No. 553.

THE G. S. WILLARD COMPANY et al., Plaintiffs,

vs.

A. MITCHELL —— et al., Defendants.

WESTENHAVER, *District Judge:*

The plaintiff, The G. S. Willard Company is a wholesale dealer or jobber in sugar, having its principal office and place of business

at Cleveland, Ohio. The individual plaintiffs are officers and stockholders in the company. This bill is filed against the Attorney General of the United States and the United States District Attorney for the Northern District of Ohio, alleging that the defendants are threatening with indictment and criminal prosecution all the plaintiffs, for sales made of sugar in violation of the provisions of Section 4 of the Lever Act as amended by an Act approved October 22, 1919. The case has been heard upon plaintiffs' application for preliminary injunction and on defendants' motion to dismiss the bill for want of equity. Full consideration has been given to the arguments of counsel, and an examination has been made of the numerous authorities cited. As a result of this consideration, I am of opinion that plaintiffs' application for a preliminary injunction should be, and it is, denied, and that defendants' motion to dismiss plaintiffs' bill for want of equity should be, and is, sustained. A memorandum giving my reasons for these conclusions will be filed later.

D. C. WESTENHAVER,
*Judge.*

Cleveland, Ohio, June 18, 1920.

22 *Final Decree.*

Entered June 21, 1920, by Judge Westenhaver.

No. 553. Equity.

THE G. S. WILLARD COMPANY, a Corporation; HENRY S. NARTEX, PERRY F. NARTEX, W. A. DUFF

vs.

A. MITCHELL PALMER, as Attorney General of the United States; Edwin S. Wertz, as United States District Attorney for the Northern District of Ohio.

This cause came on to be heard at this term on the bill of complaint of the plaintiffs and the application of the plaintiffs for a temporary injunction and the motion of the defendant, Edwin S. Wertz, United States attorney for the Northern District of Ohio, to dismiss the bill of complaint, and the same was argued by counsel and thereupon upon consideration thereof, it is ordered, adjudged and decreed as follows, namely:

(1) That the application for a temporary injunction be and the same is hereby refused;

(2) That the motion to dismiss the bill of complaint be and the same is hereby sustained;

(3) That the bill of complaint for injunction be and the same is hereby dismissed at the cost of the plaintiffs, to which order and each and every part thereof, the plaintiffs, by their counsel, then and there in open court objected and excepted.

23 *Petition for Appeal.*

Filed June 21, 1920.

In the Supreme Court of the United States.

THE G. S. WILLARD COMPANY, a Corporation; HENRY S. NARTEN, PERRY F. NARTEN, W. A. DUFF, Appellants.

vs.

A. MITCHELL PALMER, as Attorney General of the United States; Edwin S. Wertz, as United States District Attorney for the Northern District of Ohio, Appellees.

*Petition for Appeal.*

Come now The G. S. Willard Company, a corporation, Henry S. Narten, Perry F. Narten and W. A. Duff and represent to this honorable court that in the above entitled case, which is a cause pending in the United States District Court for the Eastern Division of the Northern District of Ohio, the defendants in error or appellees, being the defendants below, secured a judgment and decree of the court dismissing the complaint herein for want of equity.

Your petitioners respectfully represent that they filed their bill of complaint herein on the 4th day of June, 1920, and thereupon made application to the United States District Court for the Northern District of Ohio for a temporary restraining order. On the same date the Assistant United States Attorney for the Northern District of Ohio gave notice of the defendants' intention to file a motion to dismiss the bill of complaint. On the 15th day of June, the defendant, Edwin S. Wertz, United States Attorney for the Northern District of Ohio, filed a motion to dismiss the bill of complaint herein. The cause was thereupon submitted to
24 the United States District Court for the Northern District of Ohio on the application for a temporary injunction and the motion of the defendant, Edwin S. Wertz to dismiss the bill of complaint. Thereupon after argument of counsel and consideration of the cause submitted, said United States District Court for the Eastern Division of the Northern District of Ohio refused the application for the temporary injunction and sustained the motion to dismiss the bill of complaint and rendered a decree against the plaintiffs which was entered on the 21st day of June, 1920. The plaintiffs in the United States District Court, The G. S. Willard Company, Henry S. Narten, Perry F. Narten and W. A. Duff, duly excepted to the action of the court in refusing said temporary injunction and in sustaining said motion to dismiss and in dismissing their bill of complaint herein and prayed an appeal to the Supreme Court of the United States. The said United States District Court for the Eastern Division of the Northern District of Ohio in said decree, above referred to, held that the bill of complaint herein did

not state a cause of action in equity and that the said The G. S. Willard Company, Henry S. Narten, Perry F. Narten and W. A. Duff, were not entitled to the relief prayed for and thereby held that the Act of Congress, especially Section 4 of the act entitled, "An act to provide further for the National Security and Defense by Encouraging the Production and Conserving the Supply and Control and Distribution of Food Products and Fuel," approved August 10, 1917, and the Act of Congress amending said Section, especially Section 2 of said Act, approved October 22, 1919, which act was entitled, "Food Control and District of Columbia Rents Act," all of said legislation being commonly referred to as the Lever Act, was not in conflict with the Fifth and Sixth Amendments of the Constitution of the United States. The final order of the court, decreeing and adjudging that said bill of complaint should be dismissed, was made on June 21, 1920. The appellants herein resisted said decree and judgment of the court on the ground that the said Acts of Congress were void because in conflict with Amendments Nos. Five and Six of the Constitution of the United States, in that said acts of Congress deprived The G. S. Willard Company, Henry S. Narten, Perry F. Narten and W. A. Duff of their liberty of contract and property without due process of law and took their private property for public use without just compensation.

Said suit was founded essentially upon the allegations that Section 4 of the Act of Congress, known as the Lever Act, as amended October 22, 1919, was unconstitutional, being violative of various provisions of the Constitution and its Amendments, as fully set forth in said bill of complaint and that the enforcement of said act against appellants would work great and irreparable injury which could only be avoided by the injunctive process of the court.

That Edward S. Wertz, United States Attorney for the Northern District of Ohio, has notified counsel for appellants that the Grand Jury now in session for the Eastern Division of the Northern District of Ohio will on the 28th day of June, 1920, return an indictment against the appellants for violation of the terms and provisions of Section 4 of the Lever Act as amended October 22, 1919, and that he proposes to proceed in the usual and customary manner with the prosecution of the appellants under said indictment.

That in the present situation, in case the appellees are allowed to proceed with the prosecution and the return of the indictments and the trial of the appellants under said indictments and the Supreme Court should thereafter sustain appellants in their contentions as to the unconstitutionality of said Lever Act and should reverse the judgment of the United States District Court holding said Acts constitutional, the judgment of the Supreme Court would be and become wholly ineffectual and practically inoperative, as the acts which appellants seek to enjoin permanently would have permitted and their consequences could not be recalled or remedied and the injury and damage to plaintiff and its property and property rights would be wholly irreparable and such damages would be incapable of ascertainment or recovery against the United States if they could be ascertained.

26 That within the past few weeks there have been handed down by various United States judges and by the Circuit Court of Appeals of the Second Circuit to the extent of about twenty decisions, *to* counsel for the appellants are informed, nearly equally divided, holding said provisions of said Lever Act here involved valid, and the remaining decisions holding the same unconstitutional, and in some of said cases preliminary and permanent injunctions against the United States Attorneys have been granted; in others, refused; in others, relief in other forms granted or denied; all involving as the vital question the constitutionality or unconstitutionality of said provisions of said Lever Act.

That appeals or writs of error from many of said decisions are pending in the Supreme Court and several of them have been advanced for hearing before the Supreme Court on October 11, 1920, to insure a prompt settlement of the important questions involved and to do away with the confusion and uncertainty resulting from said conflicting decisions, by reason of which various persons in the districts in which their contention as to the unconstitutionality of the said law has been sustained have and will continue to have a great and unfair advantage over other persons in districts in which said law has been held constitutional and the prosecutions are continuing and in which very heavy fines and terms of imprisonment have already been imposed.

That the important, vital and decisive question in the above entitled suit, namely, the asserted invalidity and unconstitutionality of Section 4 of said Lever Act, as amended, is the same as that involved in the various conflicting decisions of the United States District Courts and the Circuit Court of Appeals, above referred to, and in the suits from which appeals have been taken and others doubtless are to be taken to this court as above set forth and as is involved in the cases before this court, the hearing of which has been advanced to October 11, 1920, in the Supreme Court, as likewise above stated, and appellants in this case are willing and anxious
27 to have the submission and argument of this case advanced to the earliest possible date to which this court will consent and to said October 11, 1920, if permitted so to do.

Wherefore, appellants herein pray for an order that during the pendency of the said appeal from the final decree herein to this court and until its determination, all proceedings under the decree as appealed from be stayed and said appellees restrained and enjoined from taking further proceedings against the appellants, as described in the bill of complaint herein, from filing any indictment against the appellants and from instituting any further hearings or proceedings looking to the indictment, apprehension or trial of the appellants or its officers or agents for any alleged violation of Section 4 or Section 4 as amended, of said Lever Act and that said appellants have such further or different relief as may be just and proper.

WILLIAM L. DAY,
JOSEPH G. FOGG,
*Solicitors and Counsel.*

28

## *Assignment of Errors.*

**Filed June 21st, 1920.**

**In the Supreme Court of the United States.**

**THE G. S. WILLARD COMPANY, a Corporation; HENRY S. NARTEN, PERRY F. NARTEN, W. A. DUFF, Appellants,**

**vs.**

**A. MITCHELL PALMER, as Attorney General of the United States; Edwin S. Wertz, as United States District Attorney for the Northern District of Ohio, Appellees.**

### Assignment of Errors.

Now come the appellants and petitioners, The G. S. Willard Company, Henry S. Narten, Perry F. Narten and W. A. Duff, and file herein the following assignment of errors appearing upon the record in this cause, which said appellants and petitioners aver occurred upon the trial of said cause and for which the judgment should be reversed:

(1) The court erred in holding that the Act of Congress, approved August 10, 1917, especially Section 4 of said Act, which Act is entitled, "An Act to Provide Further for the National Security and Defense by Encouraging Production and Conserving the Supply and Control and Distribution of Food Products and Fuel," was valid, as against the appellants herein.

(2) The court erred in holding that the Act of Congress, approved October 22, 1919, amending Section 4 of the Act of Congress, approved August 10, 1917, said amendatory act being entitled, "The Food Control and the District of Columbia Rents Act," was valid as against the appellants herein.

29 (3) The court erred in holding and decreeing that the said Act of Congress, approved August 10, 1917, especially Section 4 of said Act, which Act is entitled, "An Act to Provide Further for the National Security and Defense by Encouraging Production and Conserving the Supply and Control and Distribution of Food Products and Fuel," was not in conflict with Amendment No. Five of the Constitution of the United States and therefore void.

(4) The court erred in holding and decreeing that the Act of Congress, approved October 22, 1919, amending Section 4 of the Act of Congress, approved August 10, 1917, said amendatory act being entitled, "The Food Control and the District of Columbia Rents Act," was not in conflict with Amendment No. Five of the Constitution of the United States and therefore void.

(5) The court erred in holding and decreeing that the said Act of Congress, approved August 10, 1917, especially Section 4 of said Act,

which Act is entitled, "An Act to Provide Further for the National Security and Defense by Encouraging Production and Conserving the Supply and Control and Distribution of Food Products and Fuel," was not in conflict with Amendment No. 6 of the Constitution of the United States and therefore void.

(6) The court erred in holding and decreeing that said Act of Congress, approved October 22, 1919, amending Section 4 of the Act of Congress, approved August 10, 1917, said amendatory act being entitled, "The Food Control and the District of Columbia Rents Act," was not in conflict with Amendment No. Six of the Constitution of the United States and therefore void.

(7) The court erred in holding and decreeing that said Act of Congress, approved August 10, 1917, especially Section 4 of said Act, which Act is entitled, "An Act to Provide Further for the National Security and Defense by Encouraging Production and Conserving the Supply and Control and Distribution of Food Products and Fuel," was not in conflict with Article I, Section 9, Subdivision 3 of the Constitution of the United States.

(8) The court erred in holding and decreeing that said Act of Congress, approved October 22, 1919, amending Section 4 of the Act of Congress, approved August 10, 1917, said amendatory act being entitled, "The Food Control and the District of Columbia Rents Act," was not in conflict with Article I, Section 9, Subdivision 3 of the Constitution of the United States.

(9) The court erred in dismissing the bill of complaint of the appellants herein for want of equity and in rendering a decree against said appellants for costs.

Wherefore, The G. S. Willard Company, Henry S. Narten, Perry F. Narten and W. A. Duff, petitioners and appellants in this appeal pray that the judgment and decree of the United States District Court for the Eastern Division of the Northern District of Ohio, rendered on the 21st day of June, 1920, against The G. S. Willard Company, Henry S. Narten, Perry F. Narten and W. A. Duff, dismissing their bill of complaint, be reversed and that said cause be remanded to the court below for further proceedings as may be proper to be taken therein under the laws of the United States and the directions of this court.

THE G. S. WILLARD COMPANY,
HENRY S. NARTEN,
PERRY F. NARTEN,
W. A. DUFF,
*Plaintiffs.*
By WILLIAM L. DAY,
J. G. FOGG,
*Their Solicitors and Counsel.*

31

*Order Allowing Appeal.*

Entered June 21, 1920, by Judge Westenhaver.

THE G. S. WILLARD COMPANY, a Corporation; HENRY S. NARTEN, PERRY F. NARTEN, W. A. DUFF

vs.

A. MITCHELL PALMER, as Attorney General of the United States; Edwin S. Wertz, as United States District Attorney for the Northern District of Ohio.

On this 21st day of June, 1920, came The G. S. Willard Company, Henry S. Narten, Perry F. Narten and W. A. Duff, by their counsel, and presented herein their petition for appeal and also presented an assignment of errors in the same, which petition upon consideration of the court is hereby allowed, and the court herein allows an appeal to the Supreme Court of the United States upon the filing of a bond in the sum of Five Hundred Dollars ($500.00) with good and sufficient surety, to be approved by this court.

The said appeal is hereby granted to the said The G. S. Willard Company, Henry S. Narten, Perry F. Narten and W. A. Duff, from the decree and judgment of the court dismissing, for want of equity, the bill of complaint herein.

32 It is further ordered that the clerk of this court make out immediately and send to the clerk of the Supreme Court of the United States under the seal of this court all the records and proceedings and all things concerning the judgment and decree above referred to, together with this order allowing this appeal and that said records be transmitted to said clerk of the Supreme Court of the United States at the City of Washington, District of Columbia, to the end that if any error be in the judgment and decree of this court that said Supreme Court of the United States may cause further to be done in said matter to correct said error, if error there be in dismissing said bill of complaint.

33

*Bond.*

Filed June 22, 1920.

Bond on Writ of Error or Appeal.

Know all Men by these Presents, That we The G. S. Willard Company, a corp., Henry S. Narten, Perry F. Narten and W. A. Duff as principal, and Fidelity & Deposit Company of Maryland as surety, are held and firmly bound unto A. Mitchell Palmer as Attorney General of the United States, Edwin S. Wertz, as United States District Attorney for the Northern District of Ohio, in the full and just sum of Five Hundred Dollars ($500.00) to be paid to the said A. Mitchell Palmer as Attorney General of the U. S. and Edwin S. Wertz, as

U. S. District Attorney for the Northern District of Ohio their certain attorneys, executors, administrators, successors or assigns: to which payment will and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 21st day of June, in the year of our Lord one thousand nine hundred and twenty.

Whereas, lately at a session of the District Court of the United States for the Eastern Division of the Northern District of Ohio in a suit pending in said Court, between The G. S. Willard Company, a corp., Henry S. Narten, Perry F. Narten and W. A. Duff, Plaintiffs and A. Mitchell Palmer as Attorney General of the U. S. Edwin S. Wertz, as U. S. District Attorney for the Northern District of Ohio, Defendants, a decree was rendered against the said Plaintiffs and the said Plaintiffs having obtained an order allowing appeal and filed a copy thereof in the Clerk's office of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the — A. Mitchell Palmer as Attorney General of the U. S. and Edwin S. Wertz, as U. S. District Attorney for the Northern District of Ohio, defendants, citing and admonishing them to be and appear at a session of the Supreme Court of the United States, to be holden at the city of Washington, D. C. on the 21st day of July next.

Now the condition of the above obligation is such, That if the said Plaintiffs shall prosecute their appeal to effect, and answer all costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

THE G. S. WILLARD COMPANY.
By HENRY S. NARTEN,
*President.*
HENRY S. NARTEN.
PERRY F. NARTEN. [SEAL.]

W. A. DUFF.
FIDELITY & DEPOSIT COMPANY OF MARYLAND, [SEAL.]
By E. B. BERKELEY, [SEAL.]
*Attorney in Fact.*

Sealed and Delivered in Presence of

J. G. FOGG.
B. C. MILLER.

[SEAL.]

Approved by

D. C. WESTENHAVER,
*United States District Judge.*

34 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To A. Mitchell Palmer, as Attorney General of the United States; Edwin S. Wertz, as United States District Attorney for the Northern District of Ohio, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, to be held at the City of Washington, in the District of Columbia, on the 21″ day of July next, pursuant to a petition for appeal, filed in the Clerk's Office of the District Court of the United States for the Northern District of Ohio, wherein The G. S. Willard Company, a Corporation, Henry S. Narten, Perry F. Narten, W. A. Duff, are appellants and you are appellees to show cause, if any there be, why the decree rendered against the said appellants as in the said petition for appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 21″ day of June in the year of our Lord one thousand nine hundred and twenty and of the Independence of the United States of America the one hundred and forty fourth.

[Seal of the District Court, Northern Dist. of Ohio.]

D. C. WESTENHAVER,
*Judge of the District Court.*

34½ *U. S. Marshal's Return.*

THE UNITED STATES OF AMERICA,
*Northern District of Ohio, ss:*

Received this writ at Cleveland, Ohio, June 21*th* 1920, and on the 22nd day of June, 1920, at the same place. I served it on the within named, Edwin S. Wertz. By delivering to Joseph C. Brightenstein Assistant U. S. Att'y, a true and certified copy hereof, with all endorsements thereon.

CHAS. W. LAPP,
*U. S. Marshal,*
By D. J. CONNOR,
*Deputy.*

Marshal's Fees:
Travel.... .12
Service... 2.00
$2.12

Mar. No. 9286.

* Not exceeding 30 days from day of signing.

35

*Precipe for Transcript.*

Filed June 22, 1920.

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

No. 553. Equity.

THE G. S. WILLARD COMPANY, a Corporation; HENRY S. NARTEN, PERRY F. NARTEN, W. A. DUFF, Plaintiffs,

vs.

A. MITCHELL PALMER, as Attorney General of the United States; Edwin S. Wertz, as United States District Attorney for the Northern District of Ohio, Defendants.

*Precipe.*

To the Clerk:

Kindly prepare a transcript of record of the above entitled case for appeal to the Supreme Court of the United States. Include therein:

1. Copy of the bill of Complaint.

1*a*. Subpœnas and returns thereon.

2. Copy of the motion to dismiss.

3. Copy of the decree sustaining said motion to dismiss.

4. Copy of the petition for appeal to the United States Supreme Court.

5. Assignment of errors.

6. Copy of order allowing appeal.

7. Copy of bond on appeal.

8. Memorandum opinion of the court in sustaining the motion to dismiss.

9. All other docket journal entries made in said cause in the United States District Court for the Northern District of Ohio.

10. Citation.

36 And we would kindly ask that this transcript of record be transmitted at once to the clerk of the United States Supreme Court, Washington, D. C., all in conformity with the provisions of Rule 8 of the Rules of the Supreme Court of the United States.

G. S. WILLARD CO.,
HENRY S. NARTEN,
PERRY F. NARTEN,
W. A. DUFF,
*Plaintiffs,*
By WILLIAM L. DAY,
J. G. FOGG,
*Solicitors and Counsel.*

Receipt of above precipe acknowledged by receipt of copy thereof this 21st day of June, 1920.

____ ____,
*United States Attorney for the Northern District of Ohio.*

STATE OF OHIO,
*Cuyahoga County, ss:*

William L. Day, being first duly sworn, deposes and says that at 4:45 p. m., June 21st, he personally served Harry S. Eastman, Assistant United States Attorney for the Northern District of Ohio, with the within Precipe and left with him a copy thereof, said service having been made at the office of the United States Attorney for the Northern District of Ohio at the Federal Building, Cleveland, Ohio, Edwin S. Wertz, United States Attorney, being absent from the City.

WILLIAM L. DAY.

Sworn to before me and subscribed in my presence this 22 day of June, 1920.

[SEAL.]

F. MORTEN,
*Notary Public.*

37 *Certificate of Clerk.*

NORTHERN DISTRICT OF OHIO, *ss:*

I, B. C. Miller, Clerk of the United States District Court within and for said District, do hereby certify that the foregoing typewritten pages contain a full, true and complete copy of the record and all proceedings in this cause, including the petition for appeal, assignment of errors, order allowing appeal and the bond on appeal, in accordance with the precipe for transcript filed herein, the originals of which remain in my custody as clerk of said Court.

There is also attached to and transmitted herewith the citation issued and allowed herein.

In testimony whereof, I have hereunto signed my name and affixed the seal of said Court, at Cleveland, in said District, this 22nd day of June, A. D. 1920, and in the 144th year of the Independence of the United States of America.

[Seal of the District Court, Northern Dist. of Ohio.]

B. C. MILLER,
*Clerk,*
By ANNA H. ELLIOTT,
*Deputy Clerk.*

Endorsed on cover: File No. 27,775. No. Ohio D. C. U. S. Term No. 418. The G. S. Willard Company, Henry S. Narten, Perry F. Narten and W. A. Duff, appellants, vs. A. Mitchell Palmer, as Attorney General of the United States, and Edwin S. Wertz, as United States District Attorney for the Northern District of Ohio. Filed June 23d, 1920. File No. 27,775.